Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

CARL V. LAMB,

Petitioner,

vs.

UNION CARBIDE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. On an issue of slander *per se*, where defendant's employee denied that he said anything, where that fact was opposed by third party recipient, may subsequent claim of qualified privilege defeat petitioner's Seventh Amendment right to jury trial on issues of malice, excess of privilege, and credibility?

2. On an issue of libel, where published article contained material that was libelous towards persons who were terminated, and where article was posted on bulletin board on floor of building where petitioner worked, and petitioner was the only person terminated, may petitioner's constitutional right to jury trial be violated by finding that article did not refer to him?

3. On issue of tortious interference in contract, where petitioner has made *prima facie* case, may award of summary judgment for defendant violate petitioner's constitutional right to a trial by jury?

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STATEMENT OF JURISDICTION AND GROUNDS

The Court has jurisdiction under Article II, Section 2, of the Constitution of the United States and Section 1254 of Title 28 of the United States Code, 28 U.S.C. §1254.

STATEMENT OF CONSTITUTIONAL PROVISIONS

AMENDMENT VII [1791]

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This petition comes as the result of a slander, libel, and tortious interference in contract claim, wherein petitioner alleged that in the process of improperly terminating him from his employment the defendant also defamed him. The claim arose from the following events:

Petitioner, Carl V. Lamb, a mechanical engineer and an employee of Midwest Technical, Inc. (MTI), was assigned to work beginning January 13, 1986, at the defendant Union Carbide Corporation site in South Charleston, West Virginia, under defendant's employee G. R. Hattiangadi, a group leader in the Plant Engineering Department. Four months later, Hattiangadi's supervisor, Joe Dodd, Manager of Plant Engineering, instructed Hattiangadi to notify all departments that petitioner would review all HVAC work[1] that was performed anywhere in the facility. After six months petitioner was assigned to work under A.B. Williamson, who also reported to Joe Dodd.

Late in 1989, Henry Williams, another MTI employee, asked petitioner to meet with an operating department engineer to review a proposed fan installation. Petitioner advised the two that the fan was unsuitable for the application. James A. Bowyer, defendant's employee, also was present. As petitioner was leaving, Bowyer announced to petitioner, "Don't get too Goddamn cocky. I might replace you. In fact, I *will* replace you." Thereafter, Bowyer found various ways to keep petitioner aware of his hostility toward petitioner.

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[1] HVAC stands for heating, ventilating, and air conditioning. In a chemical plant, HVAC has a broader meaning than the aforementioned. It involves pneumatically transporting materials in powder form, collecting and disposing of hazardous fumes, and using various methods to clean air (scrubbers, filters, electronic air cleaners, et cetera).

One year later, the defendant announced that it was forming a Large Capital Projects Group which would be headed by Bowyer and that Bowyer would recruit staff for the group. On May 28, 1991, N.J. Mabie, a new employee of the defendant, was escorted to petitioner's on-site office. The petitioner was instructed by Mabie and his escort to show Mabie all of his work.

Petitioner immediately contacted A.B. Williamson and inquired as to the purpose of Mabie's examination of petitioner's work papers. Williamson knew only that Mabie had just been hired and that Mabie reported to Hattiangadi. Williamson asserted that he was unaware of the purpose of Mabie's visit and denied any knowledge as to who had hired Mabie.

Later that day, Mabie volunteered to petitioner his account of the details of his employment interviews with defendant's employees Bowyer and Manfred Monsour. Approximately one week later, Williamson notified petitioner that Hattiangadi's group, which now included Mabie, would handle all of petitioner's work. Williamson further informed the petitioner that he (petitioner) would be terminated at some unstipulated time in the future.

Petitioner contacted E. Bartrug, who had replaced Joe Dodd as Manager of Plant Engineering, and made the queries normal to such a situation. In the five years the petitioner had worked at the defendant's site, he had never had problems with anyone except Bowyer, and he had not responded to Bowyer's hostilities. Bartrug intimated that there had been complaints about petitioner from Hattiangadi, Williamson, and Steve Brewer, the three group leaders in the Plant Engineering Department.

Petitioner first informed Bartrug that he had always had an excellent working relationship with Hattiangadi and then further informed Bartrug that he had virtually no contact with Steve Brewer. Petitioner then stated that he was unaware of any complaints about his work performance or against him personally, and he inquired as to the nature of the complaints. When Bartrug refused to elaborate, petitioner stated that he did not believe that Williamson had ever made any such complaint. Under pressure, Bartrug admitted that this was indeed true.

Petitioner then suggested that he might like to work in the new Capital Projects Group. Bartrug informed him that this would be impossible because petitioner and Bowyer, the head of the group, did not get along. Bartrug became nervous when petitioner asked him how he had become aware of this fact. When petitioner advised Bartrug of Bowyer's threat to replace the petitioner, Bartrug became agitated and refused to face the petitioner. The petitioner charged that he was being unfairly treated and unjustly discharged from his duties; Bartrug again refused to address petitioner's complaints. When Bartrug claimed that *he* had interviewed Mabie, petitioner informed him that he knew otherwise. Petitioner related all the details concerning Mabie's hiring that he had confirmed by speaking with Mabie himself as well as with other informed parties. Since Bartrug's assertions concerning Mabie's hiring were contradictory to the facts obtained by petitioner, the petitioner abruptly ended the conversation and left Bartrug's office.

Within five minutes petitioner observed Bowyer entering Bartrug's office, which was located proximate to the petitioner's office. Approximately one hour later, Bowyer emerged from Bartrug's office and entered

Mabie's office, which was directly across the hall from that of the petitioner. When Bowyer left, Mabie informed petitioner that *he himself* would decide when he was ready to terminate petitioner. Subsequently, Mabie misinformed petitioner on several occasions as to the exact date that the petitioner's employment would be terminated. This situation, which caused the petitioner much anxiety, continued for several weeks. During this interim period, petitioner was unable to explore subsequent employment opportunities due to the indeterminate date of his termination.

On August 8, 1991, Respondent had an article published in *The Charleston Gazette,* the heading of which read "UNION CARBIDE LAYOFFS LIKELY, OFFICIAL SAYS." (Appendix p. A23, Exhibit "A").

Paragraph 7 contains the statement: "[Thad] Epps [defendant's spokesman] said the company is likely to cut its use of outside contractors and consultants, and will eliminate jobs through attrition and retirements .... [According to Epps,] 'There may well be some layoffs down the road.' "

Paragraph 10 contains the following quote attributed to Epps: "For people who feel they are good performers and are truly interested in the continued viability of their jobs, it's good news .... It's going to stengthen the corporation."

Paragraph 11 also contains a quote from Epps: "For a person who feels his performance is marginal or who feels his job is not one that is important to the overall mission of the corporation, that person might have some apprehension."

On August 9, 1991, the aforementioned article was posted in its entirety on a company bulletin board. On that very same day, Williamson informed petitioner that

he was giving petitioner two weeks notice of termination of employment. Petitioner was to inform people within the organization with whom he had work pending that Mabie would be taking over his duties. Petitioner called his employer, MTI, and could find no one who was aware of his imminent termination.

In light of the fact that the article appeared on the bulletin board the very same day that the petitioner was notified of his impending termination, and considering that many employees were discussing this article while petitioner was engaged in the process of turning over his work to Mabie, the petitioner felt embarrassed, humiliated, and disgraced. When petitioner was asked by several coworkers whether he was the only person terminated, he reluctantly admitted that he was. Petitioner observed subtle glances toward the bulletin board upon which the article was posted after he informed his coworkers of his termination.

On August 23, 1991, the petitioner's last day of work, a group of his peers assembled at a local restaurant for a dinner to be held in his honor, as was the custom with employees who were leaving. Petitioner attempted to address the group but was so overcome with humiliation that he could not do so. Petitioner could not finish the meal, so he left the restaurant and returned to the building where he had spent his last five years of employment. He was so distressed by the situation that he could not tour the building to face his coworkers and say goodbye.

In late September, 1991, petitioner was apprised by persons who were not employees of defendant that Mabie was disparaging petitioner's work in the presence of people with whom petitioner had worked. Soon thereafter, petitioner happened to see Greg Goff, an

employee of an independent contractor and former coworker, at the home of a mutual friend. When petitioner inquired if Mabie was in fact criticizing petitioner's work, Goff confirmed that this was indeed the case.

In October, 1991, petitioner filed suit in the United States District Court, Charleston, West Virginia, under Section 1332 of Title 28 of the United States Code, 28 U.S.C. §1332, seeking *compensatory damages* for slander, libel, and tortious interference in contract. *Petitioner demanded a jury trial by endorsement upon the pleadings.*

Petitioner's complaint alleged, *inter alia*:

> A. That on September 10, 1991, upon visiting the site of a control room where petitioner had performed services, defendant's employee, N.J. Mabie, in the course of his employment, made the following statement to a third party: "This must be another one of Carl Lamb's screw-ups." This remark was untrue and was defamatory. It was made without privilege and implied that petitioner was incompetent in performing his duties. This was slander *per se*.

By amendment on December 13, 1991, petitioner added the following:

> The statement was made for the sole purpose of defaming the petitioner and was not made for the purpose of protecting any interest of the defendant, nor for any other reason than causing harm to the petitioner's reputation in his field of expertise.
>
> B. That defendant libeled petitioner via the published article on August 8, 1991, and by his subsequent termination on the day after the article appeared in print.

C. That defendant's employee, J.A. Bowyer, in the course of his employment, threatened to replace petitioner. Bowyer also stated to a third party that he was "...going to get Carl Lamb." Petitioner alleged that Bowyer interfered in petitioner's contractual relationship by hiring Mabie and arranging to transfer petitioner's work away from Williamson to Hattiangadi, and that this was the proximate cause of his loss of employment.

The District Court assigned the case to Magistrate Court and petitioner *again demanded a jury trial.* The District Court granted petitioner's motion. The case proceeded to a hearing before a magistrate. The magistrate quashed petitioner's interrogatories, intimidated petitioner, and erased the record of his intimidation of petitioner. The magistrate subsequently recommended summary judgment for defendant, which petitioner strenuously objected to. The District Court, without addressing the issues raised by petitioner's portion of pretrial order, rescheduled the pretrial conference and awarded summary judgment for defendant. *No notice or memoranda accompanied the order for summary judgment to advise petitioner of a right to petition for rehearing; thus, petitioner lost his opportunity to do so.* Petitioner filed an appeal in a timely manner to the Appeals Court for the Fourth Circuit. The Appeals Court affirmed the District Court's order for summary judgment. Petitioner then filed in a timely manner a petition for rehearing and suggestion for rehearing *in banc* to the Appeals Court, citing the contradictory ruling of another Appeals Court on a similar case, and *again demanded his Seventh Amendment right to a trial by jury.* Rehearing was denied January 6, 1994, and entered on January 12, 1994. It is from this order that this petition for writ of certiorari comes before this Honorable Court.

REASONS FOR GRANTING THE WRIT

In *Celotex Corp. v. Catrett*, 477 U.S. 317, the Supreme Court held that a defendant could be entitled to summary judgment by showing the absence of an *essential element* of his opponent's case. It need not disprove petitioner's case, but it must show that some essential element was missing.

Petitioner will argue that defendant failed to make the required showing.

This court stated in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 257,

> "...[T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial."

Petitioner will show that he met this test.

The opinion of the court below conflicts with previous decisions of this Court and with the decision of another circuit.

I. On The Issue Of Slander, Was Petitioner's Constitutional Right To A Jury Trial Violated?

Petitioner will show that there was a genuine issue of fact and that there was sufficient evidence favoring petitioner's claim for a jury to return a verdict in his favor.

The first contested fact was whether the slanderous statement attributed to N.J. Mabie was indeed made. The second issue of fact was whether there was an occasion of qualified privilege and whether or not it was lost by exceeding the protection of the occasion or by malice, or both.

Petitioner alleged that the slanderous statement, as stated *supra* in the statement of the case, was indeed made. Defendant denied that this was the case and moved for summary judgment. It produced the affidavit of employee N.J. Mabie denying that he made *any* statement or *any* criticism of petitioner's work to *any* person. Petitioner produced the contradicting affidavit of Greg Goff, an employee of an independent contractor, who received the statement. This affirms that there is indeed a controversy of genuine material fact. There *is* a jury issue, unless the defendant can show that it is protected by a qualified privilege and that the privilege was not abused.

The defendant then took a position inconsistent with its denial. In effect the defendant changed its position on a fundamental issue of fact. Without retracting the denial of its employee N.J. Mabie, defendant's counsel took the affidavit of Greg Goff and constructed a scenario that would, under normal circumstances, be privileged. The defendant claimed that both Mabie and

Goff were agents of the corporation, working together in their agency. As such, the occasion was privileged, and as such it wasn't published. *Defendant did this even though there was an admission on record that an employee of a contractor, working at defendant's site, was the employee of the contractor, not of the defendant.* Petitioner submitted a second affidavit from Goff in which affiant stated:

> "He [Goff] was not working on the system that Mabie was referring to, that he had no interest in Mabie's comments, that he saw no justifiable reason for the comments, and that he [Goff] was qualified by reason of sixteen years experience to distinguish between good work and bad."

Defendant's counsel, after taking an inconsistent position, attacked Goff's second affidavit, claiming that it was submitted for no other reason than to create controversy. Goff may respond under cross examination, and, as petitioner has asserted, his testimony will eliminate any controversy. *This is a jury matter.*

Petitioner does not concede that the occasion was one of qualified privilege; but let us assume, arguendo, that it was.

According to *Fulton v. Atlantic Coast Line R. Co.*, 67 S.E.2d 425,

> "Where the person exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected."

Was the privilege exceeded? There was nothing in the ventilation system that Mabie was in attendance of when he slandered petitioner that would indicate to Mabie that he was looking at petitioner's work. After all, petitioner's

name did not appear on the ducts. Why did he bring petitioner into the occasion? There was absolutely no basis upon which he had the right to insinuate petitioner's involvement.

As stated in *White v. Nicholls,* 3 How. 266, 11 L.Ed. 591,

> "In every case where a communication would otherwise be privileged, falsehood and the absence of probable cause will amount to proof of malice."

Was there falsehood? Perhaps the best proof of malice is the lack of good faith indicated by Mabie's denial. Was there absence of probable cause? Mabie denied, under oath, that he had made the slanderous statement or any criticism whatsoever regarding petitioner's work to *any* person.

Defendant pleaded that petitioner had not pleaded malice. Petitioner can find no precedent where the defense of qualified privilege has been allowed to defeat the issue of malice when the making of the statement has been denied. The law protects the maker of a defaming statement under certain situations, as it should, but it is designed for those situations where a person honestly speaks his mind for legitimate reasons.

The ruling in this case by the Appeals Court directly contradicts the ruling by another Appeals Court on an almost identical issue. In the case of *Weldy v. Piedmont Airlines,* 985 F.2d 57 (2nd Circuit 1993), the court found that:

> (1) The issue of whether supervisor told co-employee that employee was being fired for "aggravated assault" was for the jury to decide.
>
> (2) The issue of whether former employer was entitled to assert qualified privilege was for a jury to decide.

Thus, decisions on issues of malice and credibility are jury functions.

On the issue of slander *per se*, petitioner has shown that he has a *prima facie* case. A jury could find:

(1) That the statement was indeed made, and

(2) Under proper instructions from the Court, that such statement was malicious.

Defendant failed to show that there was any essential element missing from petitioner's case on the issue of slander; therefore, defendant was not entitled to summary judgment. Petitioner submits that his constitutional right to a jury trial on this issue has been violated.

II. On Issue Of Libel, Was Petitioner's Constitutional Right To A Jury Trial Violated?

Petitioner will show that from the unrebutted extrinsic facts and circumstances there was sufficient evidence that a jury could find petitioner was libeled.

Defendant defended its statements contained in the *Gazette* article by pleading that Epps did not know and had never heard of petitioner, that the article was not meant to refer to petitioner, and that the article did not specifically name petitioner. This was the defendant's only defense. Petitioner proved by affidavit and by copy of a cancelled check that he had written to Epps, which Epps had endorsed, that Epps did in fact know petitioner. As a matter of law, it did not matter.

The Court in *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 63, 64 (1920), stated the following:

> "The fact that the publisher had no actual intention to defame a particular man, or indeed to injure anyone, does not prevent recovery of compensatory damages by one who connects himself with the publication of a libel, at least in the absence of some special reason for a positive belief that no one existed to whom the description answered. *He cannot show that a libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff.* Reputations may not be traduced with impunity, whether under literacy forms of a work of fiction, or in jest, or by inadvertence, *or by the use of words with a double meaning.*" (Italics added).

The Court stated, "*The question is not so much who was aimed at, as who was hit.*" The material fact in dispute was whether or not reference was made to the plaintiff.

Under the unrebutted extrinsic facts and circumstances of petitioner being the only person terminated while the libelous article was posted on defendant's bulletin board, a jury could find that the article libeled petitioner.

The issues of group libel and extrinsic facts and circumstances have been well covered in a landmark case by the Oklahoma Supreme Court. Citing from 31 Columbia Law review 1322, considering group libel, the Court said:

> "*The primary consideration would properly seem to be whether the plaintiff was in fact defamed, although not specifically designated. Considerations adduced in support of the absolute denial of recovery are inconclusive, as against the desirability of providing a remedy for actual injury.*" (Italics added).
>
> "A more realistic approach would recognize that even a general derogatory reference to a group does affect the reputation of every member, and would adopt as its test the intensity of the suspicion cast upon the plaintiff."

Fawcett Publications, Inc. v. Morris Okl., 377 P.2d 42 *Certiorari Denied*, 376 U.S. 513 *Rehearing Denied*, 377 U.S. 925.

By this test, group size is relatively unimportant. The test is whether the petitioner was libeled.

Petitioner has shown, by the extrinsic facts and circumstances that have not been rebutted, that a jury could find that he was libeled.

Defendant pleaded that the article did not refer to petitioner because he was not replaced. It did not plead any defense to this article other than its contention that Epps didn't know petitioner. It did not deny the posting

of the article, nor did it produce any other person who was terminated. In fact, it admitted that under certain circumstances, the article could be libelous to petitioner. Once it is established that the article is libelous, the issue becomes a factual matter, as to whether by the extrinsic facts and circumstances, petitioner was the person libeled. A jury could find, that from the extrinsic facts and circumstances surrounding petitioner's termination, that he *was* libeled. Plain common sense shows that this would not be an implausible inference. Defendant failed to show that any essential element was missing from petitioner's case on this issue of libel. By deciding the factual issue, rather than submitting it to a jury, the District Court denied petitioner's constitutional right to a jury trial, and the Appeals Court sanctioned it.

III. On Issue Of Tortious Interference, Was Petitioner's Constitutional Right To A Trial By Jury Violated?

There are matters relevant to this issue that need to be addressed. There were irregularities in the magistrate court involving discovery and alterations of the record of the hearing. These were brought to the attention of the Appeals Court. When a record of a hearing that has been altered is used by subsequent courts in determining their decisions, fundamental issues of fairness are correctly raised.

After the close of the period of time allowed for discovery, petitioner completed in a timely manner his portion of the pretrial order and submitted it to defendant's counsel. When defendant's time expired, and its counsel could not be reached by phone, petitioner called the court's law clerk. After waiting five days, petitioner filed his portion in the district court. He then filed *Notice of Defendant's Failure to Timely Submit Pretrial Order.*

In petitioner's portion of the pretrial order, he listed eighteen witnesses that he expected to call. In *Celotex Corp. v. Catrett,* 477 U.S. 317 at 324, Justice Renquist states, "Obviously rule 56 does not require the non-moving party to depose her own witnesses." In the instant case defendant did not conduct any discovery. In order to defeat summary judgment, petitioner should not be required to depose his own witnesses, especially in a case where half are hostile witnesses. Petitioner looked forward to and was prepared for the first pretrial conference, and he expected to discuss with the court the testimony of his witnesses, his theory of the case, and the contested issues of law and of fact. He did not get the opportunity because the District Court awarded the defendant summary judgment.

In his dissent in *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181 (1985), Judge Bork states,

> "...Under some circumstances, trial judges may grant summary judgment sua sponte so long as the losing party was on notice that he had to come forward with *all* his evidence ... Summary judgment does not require affirmative evidentiary proof of the absence of a factual dispute. Rather, the trial judge *need only notice this absence and demand that it be corrected.* If it is not corrected, after notice, it becomes the trial judge's duty to grant summary judgment to conserve judicial resources and avoid a useless trial." (Emphasis added).

Petitioner does not argue the trial court's right to award summary judgment where such is due, but the procedure should not degenerate into a tool used simply to reduce the court's work load. When it has been so used, it must not be allowed to stand. As stated in *Avrick v. Rockmont Envelope Co.*, 155 F.2d 568,

> "An expeditious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one's fundamental right to his full day in court."

Even without a full and fair opportunity to be heard, petitioner will show that defendant failed to show that an essential element of his case was missing on the issue of tortious interference in contract and expectancies. Where motive and intent are key to proving liability, petitioner had third party affidavits to support his case that the defendant fails to mention in its pleadings. (Appendix at pp. A8-A16, A21-A22).

In West Virginia, to establish *prima facie* proof of tortious interference, a plaintiff must show:

> (1) existence of a contractual or business relationship or expectancy;

(2) an intentional act of a party outside that relationship or expectancy;

(3) proof that the interference caused the harm sustained; and

(4) damages.

C. W. Development, Inc. v. Structures, Inc., 408 S.E.2d 41 (W.Va. 1991).

Petitioner will address each of these requirements in order:

(1) It is not contested that petitioner had an at will contract with MTI, terminable at the will of either, *not at the will of a non party.* As to his expectancy, petitioner had enjoyed the benefits of the contract for more than five years. A jury could find that it was reasonable for him to expect that it would continue.

(2) As a matter of law, defendant was an outsider to that contract. Defendant was not named in the contract. The fact that defendant had a contract between itself and MTI does not make defendant a party to petitioner's own contract with MTI.

Furthermore, petitioner was not party to the contract between defendant and MTI. Contrary to the affidavits of Bartrug and defendant's purchasing agent Barbara Toler, defendant did not specifically request the services of petitioner as an HVAC engineer. Petitioner was not distinguished from any of MTI's other mechanical engineers. No Union Carbide purchase order for *his* explicit HVAC services existed. When so requested, under rule 34 FRCP, defendant failed to produce a purchase order that specifically showed petitioner's name.

As to acts of parties outside the relationship between petitioner and MTI, his employer, any act that prevented petitioner's performance would be an act of interference. When defendant informed

petitioner that he was terminated and took his electronic gate pass, both he and MTI were *prevented* from performing.

(3) As to proof that the interference caused the harm sustained, the act is not so far removed, either in fact or in law, as not to be obvious. Defendant did not deny that it gave petitioner notice of termination of employment.

(4) As to damages, these were stated in the pleadings and are ongoing. They continue to accrue because petitioner has found only intermittent employment.

Defendant claimed that petitioner had not met his burden of proof as to factors (2) and (3) listed *supra* in *C. W. Development, Inc. v. Structures, Inc.* Defendant argued that the actions it took were within its rights under its contract with MTI.

Article VII (a) of that contract states:

"The work shall be performed by Contractor as an independent contractor, and all its [contractor's] employees engaged in the performance of the work shall be employed, promoted, disciplined, *discharged*, and assigned *solely by contractor* . . . ." (Emphasis added).

Furthermore, Article XVIII (a) of that contract limits all notices affecting the contract to notices given in writing between *designated representatives* of the two parties, which the contract named as Fred Carney for MTI and Barbara Toler for defendant. Clause (c) of this article provides against *any other means* of giving notice other than in writing. No article in that contract between defendant and MTI provides for defendant to *single* out one of MTI's employees and *terminate* him.

In its attempt to justify its interference defendant listed the factors identified in Section 767 of the 2nd Restatement of Torts and claimed, without any

specificity whatsoever, that an application of those factors established that the interference was proper. The factors are listed below:

(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference, and
(g) the relations between the parties.

The listing of the factors alone, with no other pleading than that the actions which defendant took were within its rights under its contract with MTI, fails to show that petitioner's claim was missing any essential element. On the contrary, an argument was made that the factors, when considered in light of the facts, tend to do the opposite.

As a matter of law, the fact that defendant had a contract with petitioner's employer does not justify defendant's interference in petitioner's contract unless such interference advances defendant's own legitimate interests. The existence of such a contract, by itself, does not give defendant the right to interfere in another's contract. This principle of law is illustrated by the case of *Jack D. Smith v. Ford Motor Company, et al.*, 221 S.E.2d 282.

Ford Motor Company had a contract with Cloverdale Ford, Jack Smith's employer. The court held that Jack Smith could maintain his interference action against Ford Motor because Ford Motor had no other reason for its interference other than its dislike of Smith's activity

in the alliance of the dealers association. The fact that Ford Motor had a contract with Cloverdale Ford was not sufficient to defeat Smith's claim. This principle is upheld in *Childress v. Abeles,* 84 S.E.2d 176, in which the court stated:

> "[T]he overwhelming weight of authority in this nation is that an action in tort lies against an outsider who knowingly, intentionally, and unjustifiably *induces* one party to a contract to breach it to the damage of the other party."

The Second Restatement of Torts, subsection 766, uses the clause *inducing or otherwise causing* in reference to the above issue.

Both of the above cases are very much similar to the instant case, wherein defendant's employee J.A. Bowyer acted to carry out his threat "to get Carl Lamb, no matter what." Defendant's interference in petitioner's contract was tortious and, therefore, improper. Such interference *cannot* be defended on the ground that it was lawful.

A breach of a contract is an unlawful act. Defendant may not say that its actions were permitted under its contract and cannot claim that it had a lawful right to interfere in petitioner's contract, if the action it took against petitioner was a breach of the contract under which it acted. It is true that petitioner could not complain about defendant's breach because he was not a party to the contract breached. It is also true that defendant may not defend, as a matter of law, that its action taken against petitioner was the exercise of a lawful right, if its action breached the terms of the contract under which it acted, whether petitioner had a claim for the breach or not. Defendant did not act lawfully. The contract under which defendant acted did not provide for it to do what it did.

As the above cases show, defendant is required to have some legitimate reason for such interference, other than its malice. Defendant failed to make that showing.

Petitioner pleaded that J.A. Bowyer hired N.J. Mabie, placed him in G.R. Hattiangadi's group, and then arranged to transfer the petitioner's work from A.B. Williamson's group to Hattiangadi's group for the sole purpose of carrying out his malicious threat to replace petitioner. The evidence petitioner offered was:

1. Petitioner's own testimony that Bowyer threatened, without any provocation, to replace him.

2. The affidavit of William Millar, a coworker, as to petitioner's excited utterances soon after the threat was made.

3. The affidavit of Cecil Absten, Jr., which states that Bowyer had announced to him, "...I am going to get him [petitioner] no matter what ... If I ever get the power, I will get rid of Carl Lamb ..."

4. An admission by defendant that Bowyer had recommended hiring Mabie.

5. Defendant's admission that the petitioner's work was transferred from Williamson to Hattiangadi.

6. Bowyer's affidavit, which establishes his knowledge of Mabie's hiring:

"...[A]lthough Norman Mabie was hired in order to perform general mechanical engineering tasks, Union Carbide was aware that Mabie had some background in HVAC work."

7. Carol Sue Flowers' affidavit, which does confirm that Bowyer *was* responsible for hiring Mabie and demonstrates Bowyer's deliberate insistence on placing Mabie where Bowyer wanted him. (This testimony could be admissible under the conspiracy exceptions rule.).

To support its defense that petitioner *imagined* that Bowyer hired Mabie to replace him, defendant submitted Bartrug's affidavit, which stated, in part:

> "... [B]y mid-1991 the amount of HVAC work that needed to be performed had decreased sharply. As a result, it was determined that Union Carbide no longer needed ... an engineer to perform HVAC work ... [P]rior to this determination, Norman J. Mabie was hired as an employee of Union Carbide as an engineer. Although Mr. Mabie does have some HVAC background and may undertake some of the ... HVAC work that now needs to be done, Mr. Mabie was not hired to replace Carl Lamb ..."

Defendant also submitted the affidavit of its employee, J.A. Bowyer, which includes the following:

> "...In mid-1991 the amount of HVAC work that needed to be performed ... had decreased sharply ... [A]lthough Norman Mabie was hired in order to perform general mechanical engineering tasks, Union Carbide was aware that Mabie had some background in HVAC work, and it was determined that the ... remaining HVAC work could be performed by Norman Mabie ..."

As stated *supra*, defendant could not prove that it had specifically requested from MTI the services of an HVAC engineer. Nevertheless, petitioner, a mechanical engineer by trade, was assigned to perform HVAC work for defendant. Petitioner was no more limited to HVAC work than was Mabie, as both were mechanical engineers by trade. Therefore, Bartrug's statement that the defendant did not replace petitioner with Mabie was contradicted by assigning Mabie, who was also a mechanical engineer by trade, the responsibility of performing petitioner's work.

This position is further corroborated by the petitioner's unrebutted pleading, which includes the following:

> " . . .[O]n the first hour of his first day of employment, Mabie was escorted to petitioner's office. His very first words were 'Which one of you guys does the HVAC?' [Mabie then said to petitioner] '. . .[Y]ou are supposed to show me all that you are doing . . .' "

In light of the fact that mabie was escorted directly to petitioner's office on his first day in defendant's employ and subsequently instructed the petitioner to show him all HVAC work that petitioner was performing, it becomes evident that:

> (1) Mabie's hiring was a premeditated attempt to replace petitioner.
>
> (2) Mabie was engaged to perform HVAC work, rather than the "general mechanical engineering tasks" that the defense maintains is the case.

Furthermore, the claim by Bowyer and Bartrug that Mabie was hired to perform "general mechanical engineering tasks" is inconsistent with defendant's statements in the article that appeared in *The Charleston Gazette,* which referred to forthcoming layoffs. It is unusual that a company experiencing a downturn would hire for general mechanical engineering needs; it would seem that such a company would hire only for specialty needs.

In his affidavit, E. Bartrug maintains that, ". . .Mr. Mabie . . . in fact works for a different internal work group than that for which Mr. Lamb performed his services." J.A. Bowyer's affidavit includes that ". . .Norman J. Mabie was . . . placed in the work group supervised by G.R. Hattiangadi." the above sworn testimony confirms the petitioner's claim that Mabie was placed in G.R. Hattiangadi's group. Petitioner maintains that the transfer of HVAC work from A.B. Williamson to Hattiangadi was not coincidental. Rather, it was a

deliberate, premeditated action implemented by defendant to replace petitioner, who worked under Williamson.

Bowyer's affidavit also denies that he "threatened to replace Carl Lamb or state[d] to any third party that . . . [he] was going to get Carl Lamb." Petitioner refuted Bowyer's sworn statement via the affidavit of Cecil Absten, Jr., in which Absten stated, as referred to *supra*, that Bowyer did indeed announce his malicious intentions for the petitioner.

Bowyer's affidavit, which was dated January 8, 1992, stated ". . .[t]hat as of this date Norman Mabie has only worked on one HVAC project." Petitioner has refuted this by stating that as part of the requirement that he turn over his work to Mabie, petitioner informed Mabie that several HVAC jobs were *required* to be performed in order to comply with Occupational Safety and Health Administration (OSHA) laws. Therefore, defendant's allegations that little HVAC work remained and that Mabie performed only one HVAC assignment are contested issues of fact.

Petitioner questioned in his portion of the pretrial order (in which defendant refused to participate), under contested issues of fact, "Does defendant's oral notice of termination constitute proper notice of termination, to be effective as the only notice that plaintiff ever received, in view of defendant's contention that it did not terminate plaintiff?"

Bartrug's affidavit specifically refers to the termination of the petitioner:

> ". . . [P]ursuant to the contract between Union Carbide and MTI, Union Carbide notified MTI that it was terminating its request for an engineer to perform HVAC work."

As petitioner has previously argued, defendant did not specifically request the services of an HVAC engineer in its purchase order, as the defense has pleaded. Petitioner responded by affidavit that he could find no person at MTI who had received any notice of his termination and named the persons that he had asked. A better proof is that the contract requires that notices be in writing and, when requested under rule 34 FRCP, defendant could not produce any such written notice.

This court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 257,

> "... [T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial."

Obviously, there are genuine controversies of material fact, since both of the positions maintained by the petitioner and the defendant cannot be true. Thus, it is a jury function to decide upon these contested issues of fact.

There are numerous inferences that may be raised. According to *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) at 158-159:

> "Credibility determinations, inferences, the weighing of the evidence, and the drawing of legitimate interferences from facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a direct verdict. The evidence of the non movant is to be believed and all justifiable inferences are to be drawn in his favor."

Defendant submitted its affidavits early in order to *railroad* its motion for summary judgment through the court. The magistrate accepted those affidavits as gospel truth. His finding of fact is almost an identical copy of

defendant's pleadings and affidavits. In fact, all look as if they are carbon copies of one another. No one has considered that each of the defendant's affidavits was contradicted by petitioner after each was filed. Furthermore, the petitioner's affidavits are not even mentioned in any of the documents of the defense or of the courts. Defendant has not shown that an essential element is missing from petitioner's case. Both petitioner and defendant have shown that the facts need to be resolved by a jury.

A jury should have decided the following:

(1) Whether it believed petitioner and his witnesses.

(2) Whether the fact that Hattiangadi did not himself interview Mabie is unusual, considering that Hattiangadi was an important group leader and that Mabie would be working under him.

(3) Whether Bowyer made and carried out threats against petitioner.

(4) Whether Mabie was indeed hired by defendant to replace petitioner, thus implementing Bowyer's threats.

This case, with numerous contested factual issues, where petitioner has made a *prima facie* case in spite of limited discovery, is *not* a case for summary judgment. The questions presented here involve complex issues of fact, the type of questions that the Supreme Court has warned "... should seldom be disposed of by summary procedures." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486.

Petitioner's case, like Poller's case, involved motive, intent, malice, and issues of fact and credibility. *All* of these are jury functions.

SUMMARY

Petitioner Is Entitled To A Jury Trial.

Summary judgment by the District Court without a full and fair hearing was inappropriate. The Appeals Court failed to consider that its order affirming the District Court's decision was contrary to the finding by another appeals court on a similar issue, and that it conflicts with previous decisions of this Court. On the slander claim, what was the missing essential element? If there was privilege, whether or not there was malice is a jury function. On the libel claim, the extrinsic facts and circumstances are for a jury, not a judge, to decide.

On the tortious interference claim, where the most difficult issue to prove is usually intent, the evidence in this case clearly shows intent. It is clearly a jury function to decide upon this issue.

Citing again from *Anderson v. Liberty Lobby,* which was cited at the beginning of the argument, "... [T]he plaintiff to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial."

Therefore, according to the conditions set forth above and in the cases cited herein, the requirements for trial by jury have been met. The plain simple language of the Seventh Amendment to the Constitution is clear, and it is no less important today than it was in 1791. *Petitioner is entitled to a trial by jury.*

Respectfully submitted,

Carl V. Lamb, *Pro Se*
P.O. Box 8612
South Charleston, WV 25303
(304) 755-3518

APPENDIX

Notice of Issuance of Mandate from United States Court of Appeals for the Fourth Circuit Dated January 12, 1994.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 11, 1994

No. 92-1840
CA-91-1049-2

Lamb v. Union Carbide Corp

M A N D A T E

The judgment of this Court dated 12/8/93 takes effect today.

BERT M. MONTAGUE
CLERK

Order on Petition for Rehearing with Suggestion for Rehearing *In Banc*— Denied January 6, 1994.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 4, 1994

No. 92-1840
CA-91-1049-2

CARL V. LAMB,
Plaintiff-Appellant,

v.

UNION CARBIDE CORPORATION,
Defendant-Appellee.

ENTERED
Jan—6 1994
_____ ORDER BOOK
NO. _____ PAGE _____

On Petition for Rehearing with Suggestion for Rehearing *In Banc*

The appellant's petition for rehearing and suggestion for rehearing *in banc* were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing *in banc*, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing *in banc* are denied.

For the Court,

/s/ Bert M. Montague
CLERK

A True Copy Atteste:
Bert M. Montague, Clerk
BY Pamela K. Stump
Deputy Clerk

Opinion of United States Appeals Court for the Fourth Circuit Dated December 8, 1993.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CARL V. LAMB,
Plaintiff-Appellant,

v.

UNION CARBIDE CORPORATION,
Defendant-Appellee.

No. 92-1840

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
Charles H. Haden, II, Chief District Judge.
(CA-91-1049-2)

Submitted: November 4, 1993

Decided: December 8, 1993

Before MURNAGHAN, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Carl V. Lamb, Appellant Pro Se. Gary Wayne Hart, Anthony J. Majestro, JACKSON & KELLY, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellant appeals from the district court's order dismissing his complaint alleging tortious interference with contract, libel, and slander. Our review of the record and the district court's opinion accepting the recommendation of the magistrate judge discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court.* *Lamb v. Union Carbide Corp*, No. CA-91-1049-2 (S.D.W. Va. June 11, 1992). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

*Lamb's motion to expedite the determination of his appeal is now moot and is dismissed for that reason.

**Order of United States District Court—
Southern District of West Virginia
Dated June 11, 1992.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

ENTERED
JUN 11, 1992
_____ ORDER BOOK
NO. _____ PAGE _____

CIVIL ACTION NO. 2:91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

O R D E R

Pending are cross motions for summary judgment. This matter was previously referred to the Honorable Jerry D. Hogg, United States Magistrate Judge, for submission to this Court of his proposed findings of fact and recommendation for disposition. On April 17, 1992, Magistrate Judge Hogg submitted his Report-Recommendation and recommended that Defendant's motion for summary judgment be granted, Plaintiff's

motion for summary judgment be denied, and that this case be dismissed and stricken from the docket of the Court.

The Plaintiff timely filed objections to the Magistrate Judge's Report-Recommendation. Having reviewed *de novo* those portions of the Report-Recommendation to which Plaintiff objects, the Court concludes that the objections are without merit. Accordingly, the Court adopts and incorporates herein the Magistrate Judge's Report-Recommendation and ORDERS that the Defendant's motion for summary judgment is granted, that Plaintiff's motion for summary judgment is denied, and that this action is dismissed and stricken from the docket of the Court.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: June 11, 1992

CHARLES H. HADEN II
Charles H. Haden II, Chief Judge

A TRUE COPY, Certified this

JUN 11 1992

RONALD D. LAWSON, Clerk
BY Eugenia Berger DEPUTY

Affidavit of Cecil Absten, Jr.,
Dated January 31, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority, Cecil Absten, Jr., who being duly sworn on his oath deposes and says as follows:

1. That I am the foreman for the Denny Hill Company and that I was assigned to work at Union Carbide Corporation for the past 6 years for the Denny Hill Company.

2. That I have personal knowledge of the statements made in this affidavit.

3. That during the past 6 years I performed services for James A. Bowyer at Union Carbide on more than one occasion.

4. That during the spring of 1989, James A. Bowyer stated to me: "Carl Lamb is responsible for the cost overrun on the dock shelter job. It makes it look like Steve Brewer and I don't know what we are doing, and I am going to get him no matter what."

5. He also stated the same intention later that same year saying, "If I ever get the power, I will get rid of Carl Lamb, Hattiangadi and John Maier."

Further this affiant sayeth not.

CECIL ABSTEN, JR.
Cecil Absten, Jr.

The foregoing instrument was acknowledged before me this 31 Day of January, 1992. by Cecil Absten, Jr.
My Commission Expires March 1, 1999.

JOYCE A. FISHER
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JOYCE A. FISHER
P.O. BOX 1793
Charleston, West Virginia 25326
My Commission Expires March 1, 1999

Affidavit of Carol Sue Flowers,
Dated February 25, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority, Carol Sue Flowers, who being duly sworn on her oath deposes and says as follows:

1. That I am a real estate agent employed by the Old Colony Company.

2. That I have personal knowledge of the statements made in this affidavit.

3. That I have known the plaintiff in this case for eight (8) years, and that he has referred customers to me from Union Carbide that have resulted in sales, and that he referred to me a Mr. Norman J. Mabie.

4. That on Sunday, June 2, 1991, I drove Mr. Mabie through Teays Valley, attempting to find a house that he might rent. I showed him a house in Teays Meadows, but he expressed doubt that he could back his boat into the garage. We drove into Sleepy Hollow Towneship, and he pointed out Jim Bowyer's house and said. "There's where the man lives who hired me." He further stated that he and Mr. Bowyer had become good friends and that he might ask if he could park his boat in Mr. Bowyer's three-car garage. Mr. Mabie said that, originally, he was supposed to work for Mr. Bowyer, but that Mr. Bowyer had *insisted* that he be placed in another group than that for which he had been hired.

5. I continued to assist Mr. Mabie for another two or three weeks until he rented a house on Montrose Hill in South Charleston.

Further this affiant sayeth not.

CAROL SUE FLOWERS
Carol Sue Flowers

The foregoing instrument was acknowledged before me this 25 day of February, 1992. by Carol Sue Flowers.
My Commission Expires 3-29-99.

LINDA KAY WENDELL
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
LINDA KAY WENDELL
608-613 MacCorkle Av., SW
ST. ALBANS, W. Va. 25177
My Commission Expires 3-29-99

**Affidavit of Gregory A. Goff,
Dated January 31, 1992.**

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority, Gregory A. Goff, who being duly sworn on his oath deposes and says as follows:

1. That I am an HVAC Technician employee of the Denny Hill Company and that I was assigned to work at Union Carbide Corporation for the past six years.

2. That I have personal knowledge of the statements made in this affidavit.

3. That on September 10, 1991, in company with Cecil Absten, Jr., the foreman of Denny Hill Company, and Norman J. Mabie, the Union Carbide engineer, I visited the 2nd floor control room of Union Carbide Corporation, Building 42 for purposes of investigating loss of air flow.

4. At the site, Norman J. Mabie took exception to the design of the system we were attending, being critical of the dampers and their operation. While standing with me on the platform adjacent to the control room roof and looking at the HVAC unit, ducts and dampers, he made the statement to me, "This must be another one of Carl Lamb's screw-ups".

Further this affiant sayeth not.

GREGORY A. GOFF
Gregory A. Goff

The foregoing instrument was acknowledged before me this 31 day of January, 1992. by Gregory A. Goff.
My Commission Expires March 1, 1999.

JOYCE A. FISHER,
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JOYCE A. FISHER
P. O. Box 1793
Charleston, West Virginia 25326
My Commission Expires March 1, 1999

Affidavit of Gregory A. Goff,
Dated February 26, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority, Gregory A. Goff, who being duly sworn on his oath deposes and says as follows:

1. That I have personal knowledge of the statements made in this affidavit.

2. That this affidavit is made to clarify some of the events of September 10, 1991.

3. That Norman J. Mabie and I went to Building 42 to investigate loss of air flow. When we got there, it was obvious that the problem had been corrected and that we did not have anything to investigate. As we were leaving, Cecil Absten, Jr., received a message on his pager to make a phone call, and Mr. Mabie and I waited for him to make this call. While we were outside the control room waiting for Cecil Absten, Mr. Mabie began criticizing the ducts, the dampers, and the HVAC unit. It was then he said, "This must be another one of Carl Lamb's screw-ups." This startled me. I wasn't sure that I had heard him correctly, so I asked him, "How's that?", and he repeated the above statement a second time. When Absten returned, we drove Mabie to Building 82.

4. That after we left Mabie, I told Absten that I didn't need Mabie to help me do my work. I then asked Absten not to involve Mabie in any future work that we might have to do. Absten then stated that he had asked Mabie to come along with us in case we needed Mabie to sign a purchase requisition.

5. That the comments Mr. Mabie made to me were not on the subject matter of our work. I was not working on the system that he considered to be a screw-up (nor was he), and I did not see anything wrong with it. Nor did I have any interest in his opinion.

6. That I have sixteen (16) years experience in all areas of HVAC work (including electrical, plumbing, ducting, controls, and refrigeration), and I feel that I am qualified to make a distinction between good work and bad work. I saw no justifiable reason for Mabie's comments.

7. That sometime afterwards, I saw Mr. Lamb at the home of a mutual friend. Lamb asked me, "Who did Mabie make the statement 'This must be another one of Carl Lamb's screw-ups' to?" I then told him that Mabie had made it to me.

Further this affiant sayeth not.

GREGORY A. GOFF
Gregory A. Goff

The foregoing instrument was acknowledged before me this 26th day of February, 1992. by Gregory A. Goff.

My Commission Expires February 12, 1995.

JUDITH M. TAYLOR
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JUDITH M. TAYLOR
120 Ranch Lake Boulevard
Scott Depot, West Virginia 25560
My Commission Expires Feb. 12, 1995

Affidavit of Carl V. Lamb,
Dated February 26, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority, Carl V. Lamb, who being duly sworn on his oath deposes and says as follows:

1. That I am Carl V. Lamb, the plaintiff in this case, and this is my second affidavit.

2. That I have personal knowledge of the statements made in this affidavit.

3. That during the two weeks from August 9 to August 23, 1991, when I was being dismissed from Union Carbide, I called MTI to determine who, if anyone, might have knowledge of my termination. I spoke with Rod Boyle, John Scaff, Fred Carney, Ralph Barnes, Tom Sikora, and Jackie Hunter. None of them knew anything about it.

Further this affiant sayeth not.

CARL V. LAMB
Carl V. Lamb

The foregoing instrument was acknowledged before me this 26 day of February, 1992. by Carl V. Lamb.

My Commission Expires 3-29-99.

LINDA KAY WENDELL
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
LINDA KAY WENDELL
608-613 MacCorkle Av., SW
ST. ALBANS, W. Va. 25177
My Commission Expires 3-29-99

Affidavit of Carl V. Lamb,
Dated February 6, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority Carl V. Lamb, who being duly sworn on his oath deposes and says as follows:

1. That I am Carl V. Lamb, plaintiff in this case.

2. That this statement is made for the purpose of refuting the claim of Thad Epps, spokesman for Union Carbide Corporation, that he has never heard of me.

3. In June of 1986, I purchased an automobile from Thad Epps that he represented to me as being in good condition. Three weeks after the purchase, while driving on Interstate 64, westbound between Dunbar and Nitro, West Virginia, the right frame of this automobile collapsed, allowing the right rear bumper to drop down and strike the highway.

4. Attached to this affidavit is plaintiff's Exhibit "B" which is a true copy of the front and back of the check I wrote to Mr. Epps on the car.

Further this affiant sayeth not.

CARL V. LAMB
Carl V. Lamb

The foregoing instrument was acknowledged before me this ~~4th~~ 6th day of February, 1992.
My Commission Expires 5-23-99.

SHIRLEY T. BIRD
Notary Public

(Seal)

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
SHIRLEY T. BIRD
608-613 MacCorkle Av., SW
ST. ALBANS, W. Va. 25177
My Commission Expires 5-23-99

Affidavit of William Millar,
Dated February, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action
#2-91-1049

CARL V. LAMB,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

State of West Virginia
County of Kanawha, to Wit:

This day personally appeared before me the undersigned authority William Millar who being by me first duly sworn on his oath deposes and says as follows:

1. That I have personal knowledge of the statements made in this affidavit.

2. That I am presently employed at Nissan in Smryna, Tennessee, but was employed by MTI on Union Carbide work from September 2, 1986. In March 1988, I was assigned to Building 82 at Union Carbide where I worked until May 31, 1990, directly with the plaintiff in this case, Carl V. Lamb.

3. In late February or early March of 1989, Carl V. Lamb informed me that he was going to a meeting at Building 202 with James A. Bowyer. Within an hour or so, Carl Lamb returned. I observed that he was in a highly excited agitated state, shaking his head from side to side and talking to himself. When I inquired, "What was the matter?", he said, "I can't believe that he actually threatened my job." When I inquired further, he told me that at the meeting he had said to Bowyer that he would not install a fan if he knew that the installation was improper and that Bowyer has responded, "Don't be to sure of yourself, I might replace you" and when he had responded, Bowyer then said that "I will replace you."

Further this affiant sayeth not.

WILLIAM MILLAR
William Millar

STATE OF WEST VIRGINIA
COUNTY OF PUTNAM

The foregoing instrument was acknowledged before me this (illegible) day of February, 1992 by William Millar.

My Commission Expires Aug. 14, 2001.

NANCY E. DUECKER
Notary Public

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Plaintiff's Exhibit "A"—Newspaper Clipping
from *Charleston Gazette,* August 8, 1991.

Union Carbide layoffs likely, official says

By Jim Balow
STAFF WRITER

Some Union Carbide employees in the Kanawha Valley are likely to be laid off as part of a corporate cost-saving drive, Carbide spokesman Thad Epps said Wednesday.

However, the exact number of jobs in jeopardy has not been determined and will depend on the outcome of an examination of job duties, Epps said.

Carbide officials ordered the latest round of cost-saving measures shortly after results of the company's second-quarter performance were announced July 24, Epps said.

"Carbide Corporation financial performance over the last two quarters was unacceptable, to use a charitable term," he said. "There are other words I could use.

"The performance was unacceptable compared to our competition, unacceptable to our shareholders and unacceptable to our corporate goals. With that situation, we're saying we've got to improve the bottom line.

"That has got to involve reduction of costs, and a big part of that is personnel costs."

Epps said the company is likely to cut its use of outside contractors and consultants, and will eliminate jobs through attrition and retirements. "There may well be some layoffs down the road."

Carbide officials have not set specific goals for cutting costs and jobs at each facility, but have promised to cut costs for the entire chemicals and plastics division by $200 million within three years. That division employs about 4,600 people statewide, including about 2,600 at the Tech Center, 900 at the South Charleston Plant and 180 at the Institute Plant.

"It's belt-tightening time," Epps said. "The timetable is now. We need a quick fix. The results of this will be felt before the end of the year.

"For people who feel they are good performers and are truly interested in the continued viability of their jobs, it's good news," Epps said. "It's going to strengthen the corporation.

"For a person who feels his performance is marginal or who feels his job is not one that is important to the overall mission of the corporation, that person might have some apprehension."

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